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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MARSHALL BEARCE, Administrator of the Estate of Thomas Bearce, deceased; AETNA INSURANCE COMPANY and LESLIE PALMER, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES

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On September 24, 1980, the Respondent, United States of America, filed a Supplemental Memorandum in opposition to the pending Petition for a Writ of Certiorari. The Supplemental Memorandum is based on the recent decision by the United States Court of Appeals for the Fourth Circuit in *Corros v. United States*, No. 78-1175 (Sept. 10, 1980). The characterization of the *Corros* decision by the United States in its Memorandum is misleading and necessitates the filing of this Reply.

I.

THE DECISION IN *CORROS v. UNITED STATES* DOES NOT ADDRESS OR DECIDE THE QUESTION OF WHETHER THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT IS AN IMPLIED EXCEPTION TO THE SUITS IN ADMIRALTY ACT AND, THEREFORE, IT IS NOT RELEVANT TO THE PRIMARY ISSUE BEFORE THIS COURT.

The primary issue presented by the present Petition for a Writ of Certiorari is the important federal question of whether the "discretionary function exception" of the Federal Tort Claims Act (28 U.S.C. § 2680(a)) should be implied into the Suits in Admiralty Act (46 U.S.C. § 742 *et seq.*). In the present case and in *Gercey v. United States*, 540 F. 2d 536 (1st Cir. 1976), the Seventh and First Circuits have implied this exception into the Admiralty Act. These decisions by the First and Seventh Circuits clearly conflict with the decisions of the Fourth and Fifth Circuits in *Lane v. United States*, 529 F. 2d 175, 179 (4th Cir. 1975) and *De Bardeleban Marine Corp. v. United States*, 451 F. 2d 140, 146 & n.15 (5th Cir. 1971), which have refused to imply the "discretionary function exception" into the Suits In Admiralty Act.

In its Supplemental Memorandum, the Government contends that the decision in *Corros v. United States* supports its position in this case. This assertion is without merit. In *Corros v. United States*, the Court of Appeals did not attempt to amend or modify the Fourth Circuit's earlier holding in *Lane v. United States*, 529 F. 2d 175 (1974) that the discretionary function exception is inapplicable to the Suits In Admiralty Act. Thus, the law in the Fourth Circuit with regard to the Suits In Admiralty Act remains as enunciated in *Lane*, namely, that the discretionary function exception of the Federal

Tort Claims Act is not to be implied into the Suits In Admiralty Act. The holding in *Corros* in no way changes the force and effect of the *Lane* holding.

It is important to note that the Fourth Circuit in the *Corros* case recognized that the Fourth and Fifth Circuits remain in conflict with the First and Seventh Circuits on the question of whether the discretionary function exception should be implied into the Suits In Admiralty Act. (*See* footnote 9 of opinion). This recognition of the conflict supports the Petitioners' contention that a substantial conflict exists among the circuits on this question and, therefore, this controversy is ripe for review by this Court. Instead of supporting the Government's plea for a denial of this Petition for a Writ of Certiorari, the holding in *Corros v. United States* is another example of the confusion which now reigns on the admiralty questions presented by the Petition pending in this case. Thus, the decision in *Corros* provides an additional reason for this Court to grant the Writ of Certiorari, hear this case on the merits and define the standards applicable to the numerous similar situations pending throughout the country.

II.

THE DECISION IN *CORROS v. UNITED STATES* ILLUSTRATES THE CONFLICT IN THE CIRCUITS OVER THE DEFINITION OF A "DISCRETIONARY FUNCTION" WITHIN THE MEANING OF THE UNITED STATES SUPREME COURT DECISION IN *INDIAN TOWING CO. v. UNITED STATES*, 350 U.S. 61 (1955).

In the decisions in *Bearce v. United States* and *Corros v. United States*, the Seventh and Fourth Circuits have held that the Coast Guard has no duty to design its lights and navigational aid systems in a careful manner. This holding is in conflict with the decisions in the

Fifth, Sixth and Ninth Circuits which have recognized that the Government is liable for negligent design decisions and for its failure to warn citizens of dangers in areas under Government control. *See Seaboard Coast Line R.R. Co. v. United States*, 473 F. 2d 714 (5th Cir. 1973); *United States v. State of Washington*, 351 F. 2d 913, 916-17 (9th Cir. 1965); *El Paso Natural Gas Co. v. United States*, 343 F. 2d 145 (9th Cir. 1965) and *Dye v. United States*, 210 F. 2d 123, 128 (6th Cir. 1954). The Supreme Court should now take this opportunity to resolve this conflict. Moreover, this Court should hold that the Government is liable for its negligence when it fails to carefully warn its citizens of imminent dangers created and controlled by the Government.

If this Court holds the "discretionary function exception" applicable to Suits In Admiralty Act cases, this Court should resolve the continuing conflict which now exists on the proper definition of the "discretionary function exception". *See* Section VI of the Petitioners' Petition for a Writ of Certiorari. The failure of this Court to clearly define this issue will leave the District Courts in a quandary over the proper standard to be applied in all Federal Tort Claims Act and Suits In Admiralty Act cases pending throughout the country. The District Courts need the Supreme Court's guidance on this question and, therefore, it is important for this Court to grant this Petition for a Writ of Certiorari. In addition, the boating public needs this Court's intervention to clearly establish the Coast Guard's duty to establish adequate lighting and marking facilities to prevent the continuing tragedies which are occurring on our waterways.

CONCLUSION

For these additional reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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